Supreme Court of the United States.

No. 198.—October Term, 1902.

The United States, Plaintiff in Error, vs. The Mission Rock Company. } In error to the United States Circuit Court of Appeals for the Ninth Circuit.

[April 13, 1903.]

Ejectment brought in the Circuit Court of the United States, Ninth Circuit, Northern District of California, by the United States against the California Dry Dock Company. Pending the hearing the latter company sold and transferred its title to the Mission Rock Company, a corporation, which thereupon entered into possession of the property. By stipulation the Mission Rock Company was substituted as defendant, and an amended and supplemental complaint was filed.

The property sued for was described by metes and mounds, and it was alleged constituted a "tract of land, being a square, including the rock known as Mission Rock, and containing 14.69 acres, more or less, and being a fractional part of the westerly half of section 11, township 2 south, range 5 west, Mount Diablo base and meridian." Damages and rents and profits were also prayed in the sum of $355,000.

By consent the case was tried by the court, and its findings as far as material are as follows:

"II. At the date of the admission of the State of California into the Union the premises sued for consisted of two rocks or islands adjacent to one another and projecting above the plane of ordinary high water in the Bay of San Francisco, the larger of which rose to a height of more than twenty and less than forty feet above such high water. Also of other lands contiguous thereto and surrounding said rocks or islands which were completely submerged and over which the daily tides continuously flowed and ebbed. The rocks or islands referred to are laid down on the chart in this cause and marked Exhibit 'A.'

"III. The areas of these rocks or islands above ordinary high-water mark at the time of the admission of the State of California into the Union were as follows: The one on the chart called 'Mission Rock' had an area of fourteen one-hundredths (14-100) of an acre; the other had an area of one one-hundredth (1-100) of an acre. These rocks or islands rose abruptly out of the Bay of San Francisco. Their sides to the extent that they were covered and uncovered by the flow and ebb of the tide varied from ten to twenty-five feet, depending on their steepness. Both rocks were barren, without soil or water, and were of no value for purposes agricultural or mineral. They lay at a distance of about half a mile of the then shore line of that part of the bay upon which the city of San

Francisco fronted. Navigable water divided and still divides the lands sued for from the mainland and surrounded and now surrounds them.

"IV. The lands described in the complaint were not, at the date of the admission of the State of California into the Union, within the boundaries of any valid private or pueblo grant of lands of the Spanish or Mexican governments.

"V. No approved plat of the exterior limits of the city of San Francisco as provided by the terms of section 5 of the act of July 1, 1864 (13 Stat. 332), has been filed or rendered to the General Land Office of the United States, or of the State of California. The lands sued for in this action are within such exterior limits.

"VI. On the thirteenth day of January, 1899, the President of the United States, purporting to act in conformity with the act of July 1, 1864, already referred to, issued the following order:

'EXECUTIVE MANSION, *January* 13, 1899.

'It is hereby ordered that the Mission Island and the small island southeast thereof, designated on the official plat on file in the General Land Office, approved October 12, 1898, as lots 1 and 2 of section 11, township 2 south, range 5 west, Mount Diablo meridian, California, containing, according to the plat, fourteen one-hundredths of an acre and one one-hundredth of an acre, respectively, be, and they are hereby, declared as permanently reserved for naval purposes.

WILLIAM MCKINLEY.'

"VII. On the day of March, 1864, the United States surveyor general for the State of California extended the public survey so as to comprehend and include the rocks or islands and the lands in controversy in the present suit.

"VIII. On April 4, 1870, the governor of the State of California approved an act of the legislature of the State entitled 'An act to provide for the sale and conveyance of certain submerged lands in the city and county of San Francisco to Henry B. Tichenor,' which act was printed in the statutes of California for the years 1870–1871, at page 801, is hereby referred to and made part hereof.

"The lands herein described include the lands sued for in this action.

"On the 11th day of July, 1872, the State of California, in conformity with said act, issued its patent for the said lands to said Henry B. Tichenor, purporting to convey the same to him. Said patent was duly recorded in liber 1 of Records of Patents, page 66.

"After execution of the said patent the said Tichenor executed and delivered a deed of grant, bargain and sale, dated May 1, 1878, purporting to convey the said lands to the California Dry Dock Company, which thereafter, on the 6th day of June, 1900, executed and delivered to the Mission Rock Company, the defendant, a like deed to the said lands. The last-named company has not since said date conveyed to any person or corporation the said lands.

"IX. The California Dry Dock Company, upon going into possession of said lands so conveyed, undertook the improvement of the same by filling in portions of the submerged lands immediately around and contiguous to said islands or rocks, with many thousands of tons of rock, thus increasing the available area of said lands to about four acres, upon which exten-

sive warehouses were built by it, and wharves erected for the accommodation of shipping.

"Since the issuance of the State patent hereinbefore referred to the patentee thereof up to May 1, 1878, the California Dry Dock Company from said time to the 6th day of June, 1900, and the defendant from said last-named date to the present time, have been in continuous and uninterrupted possession of the said lands, using the same and the improvements thereon for commercial purposes, and claiming to be the absolute owner thereof."

The conclusion of the court was that the United States was entitled to the lands sued for, without damages or rents and profits, and judgment was entered accordingly.

The Circuit Court of Appeals reversed the judgment, and remanded the cause with instructions "to enter judgment for the plaintiff for the recovery of the possession of the two islands or rocks mentioned in the record, containing, respectively, fourteen one-hundredths of an acre and one one-hundredth of an acre, and designated on the official plat on file in the General Land Office, approved October 12, 1898, as lots 1 and 2 of section 11, township 2 south, range 5 west, Mount Diablo meridian, California; and as respects the remainder of the land sued for, that the plaintiff take nothing." (109 Fed. Rep. 763.) This writ of error was thereupon sued out.

Mr. Justice McKENNA, after stating the case, delivered the opinion of the Court.

"It will be observed," as was said by the Circuit Court of Appeals, "that the judgment of the Circuit Court was not limited to the two rocks or islands embraced in the executive order of January 13, 1899, the one covering fourteen one-hundredths and the other one one-hundredth of an acre, but awarded the government the entire tract of fourteen and sixty-nine one-hundredths acres, including the warehouses and other improvements constructed by the defendant and its predecessors in interest." The Circuit Court of Appeals confined the recovery of the plaintiff to the rocks proper and awarded the submerged lands to the defendant. The controversy then is, which party has the title to the latter. The defendant in error is the successor of the rights and title of the California Dry Dock Company, that company being grantee of Henry B. Tichenor, who received the patent for the lands on the 11th of July, 1872, from the State of California, in pursuance of and in conformity with an act of the legislature of the State, entitled "An act to provide for the sale and conveyance of certain submerged lands in the city and county of San Francisco to Henry B. Tichenor." (Stat. Cal. 1870–71, p. 801.)

Had the State the title to convey? The plaintiff in error, in effect, contests this, and asserts besides a right to the submerged land as an easement appurtenant to the islands.

The title and dominion which a State acquires to lands under tidewaters by virtue of her sovereignty received elaborate consideration, exposition and illustration in the case of *Shively* v. *Bowlby*, (152 U. S. 1–58.) Prior cases are there collected and quoted, among others, *Weber* v. *Commissioners*, (18 Wall. 65.) From the latter as follows (and the case concerned tide lands in California): "Although the title to the soil under the tidewaters of the bay was acquired by the United States by cession from Mexico, equally with the title to the upland, they held it only in trust for the future State. Upon the admission of California in the Union upon equal footing with the original States absolute property in, and dominion and sovereignty over, all soils under the tidewaters within her limits passed to the State, with the consequent right to dispose of the title to any part of said soils in such manner as she might deem proper, subject only to the paramount right of navigation over the waters, so far as such navigation might be required by the necessities of commerce with foreign nations or among the several States, the regulation of which was vested in the general government." And Mr. Justice Gray said, delivering the opinion of the court in *Shively* v. *Bowlby:* "Each State has dealt with the lands under the tidewaters within its borders according to its own views of justice and policy, reserving its own control over such lands, or granting rights therein to individuals or corporations, whether owners of the adjoining upland or not, as it considered for the best interests of the public."

This right is an attribute of the sovereignty of the State, and it follows that in the exercise of the right, as said by Mr. Justice Gray, the State may "dispose of its tide lands free from any easement of the upland proprietor." The facts of the case emphasized its doctrine. Shively was the owner of the upland. Bowlby was the grantee of the State of Oregon of the tide lands in front of Shively's property. The grant was sustained. The sovereignty of California and the rights and powers dependent upon it are as complete as those of other States. How has California chosen to exercise them? In other words, what is the law of California as to the title and rights of riparian or littoral proprietors in the soil below high-water mark? Upon the answer to these questions the present litigation must be determined. The title papers of the defendant contain an act of the legislature of the State conveying the lands in controversy in private ownership, and the history of the State shows that the act was in accordance with the policy and practice of the State.

The legislature, commencing at the first session after the admission of the State into the Union, made grants of the tide lands to municipalities under conditions which contemplated their being conveyed to and held in private ownership. Among these was the act of March 26, 1851, known as the "Beach and Water Lot Act." It was entitled "An act to provide

for the disposition of certain property of the State of California." Section 1 provided that "all the lots of land situated within the following boundaries according to the survey of the city of San Francisco and the map or plat of the same now on record in the office of the recorder of the county of San Francisco are known and designated in this act as the S. F Beach and Water Lots; that is to say, beginning at the point," &c. Then follows a description by streets, which includes a portion of the bay. Section 2 grants the use and occupation of the land for ninety-nine years and confirms grants of lands sold by authority of the ayuntamiento, or town or city council, or by any alcalde of said town or city; and section 4 makes the boundary line described in the first section a permanent water front of the city. These acts came up for consideration, and the character of the title conveyed was defined in *Smith* v. *Morse*, (2 Cal. 524;) *Eldridge* v. *Cowell*, (4 Cal. 87;) *Chapin* v. *Bourne*, (8 Cal. 294;) *Hyman* v. *Read*, (13 Cal. 445;) *Holladay* v. *Frisbie*, (15 Cal. 635;) *Wheeler* v. *Miller*, (16 Cal. 125;) *City and County of San Francisco* v. *Straut*, (84 Cal. 124.)

These cases all expressed under varying facts the validity of the title conveyed by the acts of the legislature. They are reviewed in *Pacific Gas Imp. Co.* v. *Ellert*, (64 Fed. Rep. 421.)

In *Taylor* v. *Underhill*, (40 Cal. 473,) Mr. Justice Temple said, speaking of lands below high-water mark: "This State can probably sell the lands, and authorize the purchaser to extend the water front so as to enable him to build upon this land . . ."

The decisions cover a period of many years and have become a rule of property and the foundation of many titles. As said by Circuit Judge Ross, delivering the opinion of the Circuit Court of Appeals: "A large and valuable part of the city of San Francisco, extending from the present water front to, in some places, Montgomery street, was at the time of and subsequent to the admission of California into the Union a part of the submerged lands of the bay, but has since been filled in by the many hundred grantors under the city and State, who have erected buildings and improvements thereon at costs running into many millions of dollars. All of this was done in aid of commerce, in the upbuilding of a great city upon the bay, and with the encouragement and consent of the general government."

There is nothing inconsistent with these views in *Shirley* v. *Bishop*, (67 Cal. 545;) *People* v. *Gold Run Ditch and Mine Co.*, (66 Cal. 151;) or in *Heckman* v. *Swett*, (99 Cal. 303.) In *Shirley* v. *Bishop* there was no question of riparian rights. The defendants attempted, under a franchise from the city of Benicia, to erect a wharf within three feet of the plaintiff's wharf, and parallel to it for sixty feet in the navigable waters of the straits of Carquinez, and beyond the water front, established by an act of

the legislature of the State. The building of the wharf was restrained. The other two cases expressed the general doctrine that the title of the State to the lands covered by navigable waters is held in trust for the public. That doctrine is declared in all of the cases. It has a conspicuous illustration in the *Lake Front Case*, (146 U. S. 463.) The doctrine and its limitations are expressed in *Heckman* v. *Swett*, (99 Cal. 309,) and in *Shively* v. *Bowlby*. The court said in *Heckman* v. *Swett:* "Navigable streams and the shores to ordinary high-water mark are held by the State in trust for the public; but qualified rights therein may be granted, so far as they are not inconsistent with, or are in aid of the principal use, viz., for the purpose of navigation." In other words, the rights granted must be in aid of commerce; and it is recognized, as we have seen, in judicial decisions and established by practical examples that the conveyance by the State of its title to tide lands to be held in private ownership free from any easement of the upland proprietor, is in aid of commerce, and therefore in strict performance of the State's trust. See, in addition to the other cases, *Oakland* v. *Oakland Water Front Co.*, (118 Cal. 160.)

2. A claim was made in the Circuit Court of Appeals by the plaintiff in error under section 5 of the act of Congress of July 1, 1864, entitled "An act to expedite the settlement of titles to lands in the State of California." (13 Stat. 333.) By that section the title of the United States to the lands within the corporate limits of the city of San Francisco was relinquished and granted to the city "for the uses and purposes" specified in a certain ordinance of the city called the Van Ness ordinance, which ordinance had been ratified by the legislature of the State. Answering and disposing of the contention of the plaintiff in error, the Circuit Court of Appeals said: "Those uses and purposes . . . had no relation whatever to the rocks or islands here in controversy, which were and are far outside of the pueblo grant of lands claimed by and confirmed to the city." This is not contested here, but it is urged that "the order of President McKinley may be read, not as a reservation under that act, but as an appropriation of Mission Island and the small island southeast thereof, with the shores, contiguous submerged land, and navigable water appurtenant thereto, permanently for naval purposes." There are two answers to the contention. The order of the President explicitly designates the islands proper, and besides limits the areas appropriated to "fourteen one-hundredths of an acre and one one-hundredth of an acre respectively." At the time the order was made the land in controversy had been reclaimed by the California Dry Dock Company, and upon it were "extensive warehouses," which had been built by that company,

"and wharves erected for the accommodation of shipping." The property was so valuable that the plaintiff in error regarded itself damaged by its withholding in the sum of $250,000, and the rental thereof was alleged to be $5,000 per annum. It is not conceivable that the President, by his order, intended to appropriate so valuable a property without explicit declaration, or to leave the appropriation to result as "appurtenant" to the rocks.

Judgment affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.